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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1090

DAVID LAWRENCE NELSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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INTRODUCTORY STATEMENT

The petitioner, David Lawrence Nelson, respectfully petitions for a writ of certiorari to review a judgment and order made by the Court of Appeals for the Fifth Circuit not yet reported, but styled, "David Lawrence Nelson v. United States", affirming a judgment against the petitioner made and entered by the United States District Court for the Southern District of Mississippi, Jackson Division, on May 3, 1973.

The Court of Appeals affirmed the judgment of the District Court per curiam without an opinion. This case was decided by the United States Court of Appeals for the Fifth Circuit on November 7, 1973, and a petition for rehearing was denied on December 12, 1973. The petitioner did not receive notice his case had been affirmed until November 16, 1973. An order granting leave to file a petition for rehearing and stay of mandate was granted on the condition that the petitioner filed with this court a petition for writ of certiorari no later than January 11, 1974.

A Multilith Appendix was filed with the Court of Appeals for the Fifth Circuit and a true and correct copy of the Multilith Record has been filed. All references herein to the record are to the Multilith Appendix.

JURISDICTIONAL STATEMENT

Petitioner believes this Court has jurisdiction to review the decision by writ of certiorari by virtue of 28 USC 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Was the petitioner prejudiced by the trial court in its departure from the doctrine laid down in the case of **Simmons v. United States,** 390 US 377 (1968), in that (a) a photographic spread was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification, (b) when the trial court did not follow the procedural guidelines relating to photographic identification laid down by the Fifth Circuit Court of Appeals in the case of **United States v. Sutherland,** 428 F.2d 1152 (1970), and **U. S. v. Ballard,** 423 F.2d 127 (1970), in that the trial court made a **Simmons** issue determination when the entire photographic spread that was shown to the complaining witness was not before the trial court?

2. At the time that the photographs were taken of the petitioner was he under an illegal arrest as defined by this Court in the case of **Davis v. Mississippi,** 394 US 721 (1969)?

STATUTES INVOLVED

This case involves Title 36, Code of Federal Regulations, Sub-Section 2.7 (b)(2).

STATEMENT OF THE CASE

The petitioner was charged with a two-count information in violation of Title 36, **Code of Federal Regulations,** Section 2.7(b)(2) in engaging in disorderly conduct on the Natchez Trace, a federal parkway. Both counts of the information charged the petitioner with substantially the same offense against two different white females, one occurring on or about November 14, 1972, and the other occurring on or about March 17, 1972. The alleged offenses took place on the Natchez Trace Parkway between Fayette in Jefferson County, and in Natchez in Adams County, Mississippi.

The defendant is a negro male in his mid-twenties who is a resident of nearby Fayette, and works in Natchez. The defendant is employed at a paper mill in Natchez, and has been active in promoting and protecting the rights of all negroes in the employment practices of the paper mill. He has thereby created a tremendous amount of ill will and animosity toward him as a result of his activities enforcing his civil rights.

The government's evidence against the petitioner consisted entirely of the testimony of the two complaining witnesses. Testimony of those two witnesses, with particular regard to their identification of the petitioner, was predicated on the fact that they were shown photographic spreads; and from the spreads, they picked out the petitioner as being the culprit of the alleged

crimes. This is notwithstanding the fact, in regard to Count Two of the information, the complaining witness observed the petitioner leaving his place of employment and could not identify him, although she was within only a very few feet of the petitioner (App. 127).

The Court's attention is called to the government's exhibit No. 1, which is part of the photographic spread shown to the complaining witness in Count One of the information. With the exception of the defendant, the other pictures have law enforcement agency identification tags hanging around the necks of people, with the exception of one photograph of a soldier in uniform. The identification plates show the Houston, Texas, Police Department, and the Harris County, Texas, Sheriff's Department. The alleged offense occurred in the State of Mississippi while the complaining witness in Count One was a resident of Natchez; but the photographic spread, with the exception of the defendant, indicates pictures of people who were in Texas (App. 312).

The government's witness in Count One was also shown another picture of the defendant, which she also picked out as being him, according to her testimony; but this picture was not available to the defendant or his counsel at trial (App. 104). Timely objection was made on the grounds that the learned trial magistrate could not make a determination in accordance with **U.S. v. Sutherland,** *supra*, because the entire spread of photographs was not before him, as per the testimony of the government's witness. However, notwithstanding this fact, the learned trial magistrate decided to completely ignore and dispense with the guidelines, both procedural and substantive, laid down by this Court and make his own law and overrule the objections of the defendant, even over the objection of the United States Attorney (App. 40, 107).

At the trial the complaining witness in Count Two of the information stated that she could not positively beyond a reason-

able doubt and to a moral certainty say at the time that the petitioner was the culprit who committed the alleged offense against her on the date in question. She only stated that she could be very positive about the car (App. 141, 147).

REASONS FOR GRANTING THE WRIT

The decision rendered by the Court of Appeals for the Fifth Circuit is, with deference, in conflict with **Simmons v. U.S.,** *supra*, and in conflict with **Davis v. Mississippi,** *supra*. This case involves an important question of federal law which should be settled by this Court under its supervisory powers.

ARGUMENT

1. Was the petitioner prejudiced by the trial court in making a Simmons issue determination when the entire photographic spread shown to the complaining witness in Count Two of the information was not before the court, and in ruling that the petitioner did not fall within the facts and law as laid down by this Court in the case of **Davis v. Mississippi,** *supra*?

Simmons v. U.S., *supra*, and other cases from various circuits have laid down the substantive and procedural law concerning the use of photographic spreads for identification. It is respectfully submitted that in the spirit of **Simmons** and all other case law concerning photographic spreads that a trial court cannot make a correct and legal **Simmons** issue determination when the entire photographic spread is not before the court, which is the case at bar.

It is respectfully submitted that the facts of this case will clearly show that the manner in which the photographs were taken of the petitioner in time and place by agents of the Federal Bureau of Investigation and also state law enforcement agents

while he was clearly under an illegal arrest puts the petitioner squarely within the law as laid down by this Court in **Davis v. Mississippi,** *supra.*

CONCLUSION

Petitioner respectfully submits that a review of the record would indicate that this petition for writ of certiorari should be granted, and that the judgment of the Circuit Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Southern District of Mississippi, Jackson Division, should be set aside, the judgment of conviction reversed, and this cause remanded for a new trial.

Respectfully submitted

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